

Supreme Court, U.S.
FILED

No. 05 - 975 MAY 26 2005

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In The
Supreme Court of the United States

— ♦ —
FREDERICK J. BRUSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

— ♦ —
**On Petition For A Writ Of Certiorari
To The Sixth Circuit Court Of Appeals**

— ♦ —
PETITION FOR WRIT OF CERTIORARI

— ♦ —
FREDERICK J. BRUSH, #17333-075
United States Penitentiary McCreary
P.O. Box 3000
Pine Knot, Kentucky 42635-3000
(606) 354-6000

QUESTIONS PRESENTED

- 1) WHETHER THE PETITIONER SHOULD HAVE BEEN ISSUED A CERTIFICATE OF APPEALABILITY (COA) BY EITHER THE MIDDLE DISTRICT COURT OF TENNESSEE OR THE SIXTH CIRCUIT COURT OF APPEALS?
- 2) WHETHER THE PETITIONER WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?
- 3) WHETHER PETITIONER WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE SIXTH AMENDMENT AND DUE PROCESS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

**ALL PARTIES APPEAR IN THE CAPTION OF THE
CASE ON THE COVER PAGE**

FREDERICK J. BRUSH – Petitioner

UNITED STATES OF AMERICA – Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was: February 28, 2005 and appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

REASONS FOR GRANTING THE WRIT

Petitioner Frederick J. Brush stands unconstitutionally convicted of the charge of one count of 18 U.S.C. Section 2252(a)(2)(A) Receipt of Child Pornography and further contends that the petition should be granted for the following reasons:

1.) To preserve and protect the constitutional rights of this Petitioner and any others similarly situated.

2.) To provide firm and unwavering guidance to the lower courts in regard to the insurance of Certificate of Appealability (COA) which is in conflict with this court as found in *Miller-El v. Cockrill*, 537 U.S. 322, 324, 123 S.Ct. 1029 (U.S. 2003).

3.) The decision of the U.S. District Court for the Middle District of Tennessee is in conflict with 18 U.S.C. Section 3282 and the decisions of other Federal Courts regarding what constitutes a violation of "due process" in both the Fifth and Sixth Amendments of the U.S. Constitution. 18 U.S.C. Section 3282, *Mann v. United States*, 304 F.2d 394, and *Hedgepeth v. United States*, 364 F.2d 684 (C.A. D.C. 1966).

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER SHOULD HAVE BEEN ISSUED A CERTIFICATE OF APPEALABILITY (COA) BY THE SIXTH CIRCUIT COURT OF APPEALS. *MILLER-EL V. COCKRILL*, 123 S.CT. 1029, 537 U.S. 322, 324 (U.S. 2003)

A conflict exists between the strict interpretation of *Miller-El v. Cockrill*, 123 S.Ct. 1029, 537 U.S. 322 (U.S. 2003) by the Sixth Circuit Appellate Court which denied Petitioner's Motion to Issue Certificate of Appealability (COA) and the more liberal guidelines held by this Court.

Following the sentencing in the United States Court for the Middle of Tennessee by Judge Todd J. Campbell on February 10, 2003, Petitioner filed a pro-se Motion to Vacate, Set Aside and Correct Sentence by a person in Federal Custody (28 U.S.C. Section 2255) into the United States District Court on February 9, 2004.

On June 17, 2004 the United States District Court for the Middle of Tennessee, Judge Todd J. Campbell sua sponte denied this motion to Vacate, Set Aside and Correct Sentence by a Person in Federal Custody. Petitioner then filed a motion to Reconsider on June 27, 2004. Motion to Reconsider was denied by Judge Campbell who also stated an application to issue a Certificate of Appealability (COA) would also be denied.

A proper and timely application for a Certificate of Appealability in accordance with 28 U.S.C. Section 2253 was filed to the Sixth Circuit Court of Appeals on September 2, 2004. The Sixth Circuit Court of Appeals denied the Motion to issue a (COA) on February 28, 2005.

The Petitioner contends the Sixth Circuit Court of Appeals should have issued the COA in accordance with the proper reading of *Miller-El v. Cockrill*, 123 S.Ct. 1029, 537 U.S. 322, that reasonable jurists could have debated whether there was a valid denial of Petitioner's Constitutional rights guaranteed under the Fifth and Sixth Amendments.

When a habeas applicant seeks a COA, the court of appeals should limit its examination to a *threshold inquiry* into the underlying merits of his claims. The inquiry *does not* require the full consideration of the factual or the legal basis supporting the claims. Consent with the courts and the statutory text, the person need only demonstrate "a substantial showing of a denial of a constitutional right." The Petitioner more than satisfied this standard when he provided convincing argument that his constitutional right to a Speedy Trial, guaranteed by the Sixth Amendment, was violated. (See Appendix J). By satisfying this standard, [of demonstrating a substantial showing of a denial

of a constitutional right], Petitioner has demonstrated that jurist of reason could disagree with the Circuit Courts resolution of this case and that the issues presented were adequate to deserve encouragement to proceed further. "He need not convince a judge or for that matter, three judges, that he will prevail, but must demonstrate that reasonable, [537 U.S. 324] jurists would find the District Court's assessment of the Constitutional claims debatable or wrong." 537 U.S. 324.

PRAYER FOR RELIEF

WHEREFORE, based on the above facts and prior guidance from this Court, Petitioner prays his petition for a Writ of Certiorari will be granted.

WHETHER THE PETITIONER WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

A conflict exists between Petitioner's preindictment delay complaint as adjudicated by the Middle Tennessee District Court and the decisions of other lower courts on the same issue.

The due process clause of the Fifth Amendment to the Constitution of the United States protects the accused against a purposeful, unreasonable oppressive or unexplained delay regarding the stale return of an indictment.